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TIDELANDS IN SOUTH CAROLINA: A STUDY IN THE LAW OF REAL PROPERTY

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INTRODUCTION, PURPOSE AND SCOPE

Since the decision in *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*,[1] there have been some fifteen opinions of the Attorney General of South Carolina to the general effect that lands between high and low water marks of tidal navigable streams belong to the people of the State in common and can be granted, if at all, only by the General Assembly.[2] Two subsequent opinions, neither of which is digested under Navigable Waters, carry this view even further.[3] In one, the opinion was expressed that an act which purported to confirm the title of various individuals to certain marshland in fact had the effect of granting such marshland, thus violating Section 31 (f) Article III of the Constitution of 1895.[4] In the other, it was said that an act was "unconstitutional as granting to the beneficiaries certain of the marshlands which admittedly were not covered by grants from Lords Proprietors and that it is an encroachment upon the judiciary, whose duty it is to pass upon construction of deeds and grants."[5]

The purpose of this paper is to subject to critical analysis every South Carolina decision bearing directly or indirectly on the ownership and legal status of lands lying below the high water mark of tidal navigable waters, with a view toward suggesting a different interpretation of *Cape Romain*. To accomplish this purpose it will be necessary to examine incidentally a few decisions from outside South Carolina.

MARSHLAND IS VALUABLE

In cities and similar urban areas marshland is principally valuable after it has been reclaimed for building lots; but in

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1. 148 S.C. 428, 146 S.E. 434 (1928).
2. See 14 WEST'S S.C. DIGEST, *Navigable Waters*, Key Nos. 36(1) and 36(3).
3. 1958-59 ATT'Y GEN. ANN. REP. 646 and 647.
4. *Id.* at 646.
5. *Id.* at 647.

rural areas it can be and is used for cattle grazing, shrimp farming, duck hunting preserves, and in some localities, for breeding of muskrats and other fur-bearing animals. The Soil Conservation Service of the United States Department of Agriculture has published a number of handbooks dealing with marsh management in various parts of the United States and is currently engaged in the publication of such a handbook for South Carolina. In order to do this, it has engaged in intensive and extensive research in this state, in other parts of the United States, and abroad. This state itself has done extensive research in this field through the well known work of Dr. G. Robert Lunz at the Bear's Bluff Laboratory.

At one time the phosphate deposits underlying our South Carolina marshes were considered one of the great natural resources of the State,[6] and our reported cases show that marshland has been used for cutting grass,[7] for the deposit of oysters shells,[8] and for harvesting oysters.[9] The authors know of numerous instances, and are reliably informed that there are many others in which landowners in the coastal counties of South Carolina are spending large sums of money to improve marshlands, both so that they can be used as marsh and so that they can be reclaimed as building lots. For this reason, the authors feel that this study is of considerably more than mere academic interest.

MARSHLAND IS GRANTABLE

For the purpose of this study, all lands may be divided into five classes:

I. Lands above ordinary high-water mark, sometimes known as fast lands;

II. Lands below ordinary high-water mark in waters which are not tidal even though they may be navigable;

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6. Coosaw Mining Co. v. South Carolina, 144 U.S. 550, 36 L.Ed. 537 (1892); Chisolm v. Caines, 67 Fed. 285 (1894); Heyward v. Farmer's Mining Co., 42 S.C. 138, 19 S.E. 963 (1894); Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889); State v. Pacific Guano Co., 22 S.C. 50 (1884).

7. Frampton v. Wheat, 27 S.C. 288, 3 S.E. 462 (1887); Church v. Meeker, 34 Conn. 421 (1867).

8. Town of Port Royal v. Charleston & W.C. Ry., 136 S.C. 525, 134 S.E. 497 (1926).

9. Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S.C. 428, 146 S.E. 497 (1926).

III. Lands between ordinary high-water mark and ordinary low-water mark in waters which are both tidal and navigable;

IV. Lands between ordinary high-water mark and ordinary low-water mark, and lands below ordinary low-water mark, in waters which are tidal but not navigable; and

V. Lands below ordinary low-water mark in waters which are both tidal and navigable.

Lands in class II are subject to the same rights of property as are lands in class I[10] and are outside the scope of this study.

Lands in class III and class IV are herein referred to as "marshland" and as hereafter shown are likewise subject to the same property rights as lands in class I.

Lands in class V are subject to private ownership only to a limited extent. A failure to distinguish between such lands in class V on the one hand, and lands in classes III and IV on the other, has caused such confusion as may seem to exist in the authorities.

So far as the authors have been able to discover there are only two texts which undertake to set forth the property rights in lands in classes III, IV, and V as such property rights existed under the common law of England.[11]

To the extent that they deal with common law property rights in lands in classes III, IV, and V they are substantially identical and are believed by the authors to be authoritative.

Sir Mathew Hale thus states the rules of the common law concerning the lands which we have described as belonging in class III:

> I come now to those other parts of property which a subject may have by prescription or usage, viz. the sea-shore and maritime increases; which, though we have before stated to belong prima facie to the King, yet they may belong to the subject in point of propriety, not only by charter or grant, whereof there can be but little doubt, but also by prescription or usage.

10. McCullough v. Wall, 4 Rich. 68 (S.C. 1850).
11. The earlier is DE JURE MARIS, attributed to Sir Matthew Hale, and the other is A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF, by Joseph K. Angell, usually referred to as ANGELL ON TIDEWATERS.

1. The shore of the sea.

There seem to be three sorts of shoars, or littora marina, according to the various tides, viz.

(1st.) The high spring tides, which are the fluxes of the sea at those tides that happen at the two equinoxials; and certainly this doth not de jure communi belong to the crown. For such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionable belong to the subject. And this is admitted of all hands.

(2nd.) The spring tides, which happen twice every month at full and change of the moon: and the shoar in question is by some opinion not demoninsted by those tides neither, but the lands overflowed with these fluxes ordinarily belong to the subject prima facie, unless the king hath a prescription to the contrary. And the reason seems to be, because for the most part the lands covered with these fluxes are dry and maniorable; for at other tides the sea doth not cover them; and therefore touching these shoars some hold, that common right speaks for the subject, unless there be an usage to entitle the crown; for this is nor properly littus maris. And therefore it hath been held, that where the king makes his title to land as littus maris, or parcella littoris marini, it is not sufficient for him to make it appear to be overflowed at spring tides of this kind.

* * *

(3rd.) Ordinary tides, or nepe tides, which happen between the full and change of the moon; and this is that which is properly littus maris, sometimes called marettum, sometimes warettum. And touching this kind of shoar, viz. that which is covered by the ordinary flux of the sea, is the business of our present enquiry.

1st. This may belong to a subject. The Statute of 7 Jac. cap. 18 supposeth it; for it provides, that those of Cornwall and Devon may fetch sea-sand for the bettering of their lands, and shall not be hindered by those that have their lands adjoining to the sea-coast, which appears by the statute they could not formerly.

* * *

2d. It may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor. (citations and explanations) And the evidences to prove this fact are commonly these; constant and usual fetching gravel and sea-weed between the high water and low water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of puprestures there in the court of a manor; and such like.

And as it may be parcel of a manor, so it may be parcell of a vill or parish; and the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the person of Sutton about 14 Car. had a verdict for the tithes of Sutton-Marsh in Lincolnshire, upon a long and great evidence; though it appeared, that within the time of memory it was the meer shoar of the sea covered at ordinary tides, and without the old sea-bank.

3rd. It may not only be parcell of a manor, but de facto it many times is so; and perchance it is parcell almost to all such manors as by prescription have royal fish or wrecks of the sea within their manor. For, for the most part, wrecks and royal fish are not, nor indeed cannot be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land; but these are perquisities, which happen between the high-water and low-water mark, for the sea withdrawing at the ebb leaves the wrecks upon the shore, and also those greater fish which come under the denomination of royal fish. He therefore that hath wreck of the set or royal fish by prescription infro manerium, it is a great presumption that the shoar is a part of the manor, as otherwise he could not have them.

* * *

Thus much shall suffice concerning the shoar or space between the high-water and low-water mark, which may belong to a subject and be parcell of his manor.

The same thought is expressed by Angell in somewhat different language. In Chapter IV he says (pp. 64-66):

> Shore: We next proceed to consider what is to be understood by *the shore* of the sea and its arms. . . . In legal construction, it may be said to be *that space of land which is alternately covered and left dry, by the rising and falling of the tide.* Or, in other words, that space of land which is between the high and low-water marks. And this space as has been shewn, *is prima facie* public.
>
> *How high-water is determined.* The next question then is, what is to be considered as the high-water mark; as it is well known, that the tide rises much higher on some occasions, and at some seasons of the year, that it usually does.
>
> By the Roman law, it seems, high-water mark was determined by the highest tides, and the shore was understood to include the land *as far as the greatest wave extended itself in the winter.* . . .
>
> By the common law, as it is laid down by lord Hale (o) and others, the soil which is overflowed by high spring tides, or by extraordinary tides at any time, does not properly come under the denomination of shore, and consequently the sovereign and public right is notof that large extent. The rule which lord Hale lays down and which is now understood to prevail, is that the shore is that land only which is usually overflowed *by ordinary tides.*

And in Chapter VI, Angell says, (pp. 87, 96-97):

> RIGHTS ACQUIRABLE IN SALT AND TIDE WATERS, AND IN THE SOIL AND SHORES THEREOF, BY PRESCRIPTION AND CUSTOM AND BY GRANT
>
> ALTHOUGH it has been made to appear, that *prima facie,* the sovereign has the right of property in salt and tide waters, and that they are also for the public use; yet there are many maritime interest to which an exclusive right may be acquired by prescription, custom and grant.
>
> * * *
>
> Not only the exclusive right of fishery in salt and tide waters, but also the exclusive right to the *shores* and soil

thereof, may be acquired by prescription and custom. Hence, all those marine increases which were stated in chapter V as *prima facie,* belonging to the sovereign power, may become the property either of an individual, or of a particular town or district.

That the shore and soil covered with water, may belong to a subject, appears by the charter of Alen de Percy, to the monks of Whitby, in which the bounds of the possessions belonging to the Abbey, included many salt water creeks; and yet there were granted by a subject (x)

The right to the shores and soil of salt and tide waters, may not only be acquired in gross by an individual in the manner above-mentioned, but may also be a *part and parcel of an adjoining estate,* as appears by Sir Henry Constable's case. (y)

To prove a private ownership in these cases, the evidence according to lord Hale, is the constant and usual practice of taking the gravel and sea weed, between the high and low-water marks, and licensing others to do the same; enclosing and embanking against the sea, &c. Thus in a late case in England, (Chad. v. Tilsed, before mentioned) (z) where the proprietors of certain lands had without opposition, for forty years asserted and exercised by an embankment, an exclusive right to the soil of a bay; it was held by the court that such usage was evidence, whence *anterior* usage might be presumed.

The earliest South Carolina decision is the *Oak Point Mines,*[12] a circuit decision which was not appealed from but was published as an appendix to Volume 22 of the S. C. Reports at the suggestion of one of the justices of the supreme court and was cited as authoritative in the recent South Carolina case of *Beaufort County v. Jasper County.*[13] It is the only decision to which the state was a party and in which the title to land lying between the ordinary high and the ordinary low-water marks was expressly in issue. The defendants claimed under a grant made in 1869 which expressly conveyed to the low-water mark. Circuit Judge Maher held that the defendant's title was good and that the state's contention that such land was not grantable, was wholly lacking in merit.

12. State v. South Carolina Phosphate Co., 22 S.C. 593 (1874).
13. 220 S.C. 469, 69 S.E.2d 421 (1951).

The same point was also decided in *Frampton v. Wheat*,[14] which was, however, an action between private parties. This was an action to recover two hundred acres of marsh land adjacent to Plum Island in the Ashley River in Charleston Harbor. The plaintiff relied on an 1826 grant for seven hundred seventy-nine acres of marsh land which included the land in dispute. The defendant offered no evidence but successfully moved for a non-suit on the ground that the 1826 grant was void because the underlying survey violated an act which required grants of land on navigable waters to have a depth four times as great as their frontage. The supreme court held that the non-suit was erroneous, and in so doing necessarily and expressly held that the grant of marsh land was valid. In so holding, the court relied upon *State v. Pacific Guano Co.*,[15] and the *Oak Point Mines*.[16]

The decisions in *Chamberlain v. Northeastern R. R.*[17] and *Heyward v. Farmers' Mining Co.*[18] also recognized that lands in class III are grantable.

The four decisions above referred to have never been overruled or modified in any respect and, as previously stated, the decision in the *Oak Point Mines* was relied upon in *Beaufort County v. Jasper County*, which is the most recent pronouncement of the Supreme Court of South Carolina. As will hereafter be shown, the question of whether such lands are grantable was not before the court in *Cape Romain* and the unfortunate dictum in that case, to the effect that such lands are held in trust by the state, should not be deemed authoritative or of any weight, in view of the express contrary decisions in cases where the precise point was actively litigated.

The *Oak Point Mines*, *State v. Pacific Guano Co.*, *State v. Pinckney*, and *Heyward v. Farmers' Mining Co.* all involved titles to phosphate beds. With the decline of the phosphate industry litigation over such titles ceased, and it is often supposed that the next case concerning marshland titles to come before our supreme court was the *Cape Romain case*. In fact, however, there were six decisions of some pertinence between *Heyward v. Farmers' Mining Co.* and *Cape Romain*.[19]

14. See note 7 *supra*.
15. See note 6 *supra*.
16. See note 12 *supra*.
17. 41 S.C. 399, 19 S.E. 743 (1894).
18. See note 6 *supra*.
19. Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927); Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596.

Nathans v. Steinmeyer was an action to foreclose a mortgage over certain marsh or mud flats in the western section of Charleston, on the shores of the Ashley River, which was covered by the daily flow of the tides. The defense was failure of consideration, in that paramount title was in the City of Charleston. The plaintiffs claimed under a grant made in 1675, and they contended that this grant conveyed to the low-water mark, either by its express terms or by settled usage under the grant. The defendants contended that the grant extended only to the high-water mark and that title to the land in controversy had been conveyed to the City of Charleston by an act of the General Assembly.[20] The court held that since neither the state nor the city were parties to the action, and since the defendants had not been evicted, the defense of failure of consideration could not be raised and the above stated contentions of the parties need not be resolved.

The interesting feature of this case is that the defendant Steinmeyer, and his father before him, had been in possession of this land since 1842—only six years after the act of 1836 above referred to—yet, the city had never asserted its supposed title. Furthermore, this tract was sold in 1942 for non-payment of a street improvement assessment and was bought by the city. In recent years, it has been largely reclaimed and part of it is again in private ownership and is being held for sale at an asking price reputedly in excess of $100,000.00.

The only interesting feature of *Gadsden v. West Shore Inv. Co.* is that it was an action for the specific performance of a contract to buy forty-four acres of marshland, also in the City of Charleston. This marsh had been granted in 1744 and the only defense was that the plaintiff's title, obtained at a tax sale, was defective. The court sustained the plaintiff's title.

Town of Port Royal v. Charleston & W. C. Ry. involved an action to recover possession of a parcel of land which had been created over a course of many years by the deposit of oyster shells from an oyster canning factory. The defendant railroad had a spur tract over part of this land. The town was non-suited for failure to prove title to the whole parcel sued for, and on appeal the non-suit was affirmed without

(1923); Gadsden v. West Shore Inv. Co., 99 S.C. 172, 82 S.E. 1052 (1914); West End Dev. Co. v. Thomas, 92 S.C. 229, 75 S.E. 450 (1912); Nathans v. Steinmeyer, 57 S.C. 386, 35 S.E. 733 (1900).

20. 7 Stat. at Large 151 (1836).

prejudice to the town's right to bring a new action for such of the land as had not been occupied by the railroad as a right of way.

So far as we can discover, this is the only South Carolina decision involving title to reclaimed land except for those cases discussed in this article which deal with land bordering Charleston Harbor which was formerly marshland but which has been filled in. In those cases the land in its unreclaimed state had all been granted, in part to private persons and in part to the City of Charleston, by the Act of 1836,[21] but in this case the town apparently relied only on adverse possession.

The most important of the Charleston Harbor cases is *Ehrhardt v. City Council of Charleston,*[22] decided many years after *Cape Romain.* It is therefore appropriate to discuss *Cape Romain* next.

In *Cape Romain,* the plaintiff sued for the possession of some thirty-four thousand acres covered by seven separate grants, some of which specifically referred to "marsh" or "marshland," but only one of which specified the low-water mark as a boundary. The defendants, under a license from the state, were gathering oysters between the high and low-water marks within the exterior boundaries of the plaintiff's grants. However, they were gathering no oysters in the area where the low-water mark was specified as the boundary.

The circuit court found as a fact that the plaintiffs had not established title to the lands between the high and low-water marks within the exterior boundaries of its grants. The evidence on which the court based this holding is not reported, but it does appear that its practical effect was to deprive the plaintiff of most of the benefits of its grants since nearly all the land within their exterior boundaries was covered with water at high tide. On appeal this finding of fact was affirmed, because it ". . . was a question for the circuit judge who passed on the facts in a law case, to whom the facts were submitted instead of submitting them to a jury. . . ."[23]

The plaintiff in *Cape Romain* also relied upon title by adverse possession, but this issue was also resolved against it as a question of fact.

21. *Ibid.*
22. 215 S.C. 390, 55 S.E.2d 132 (1950).
23. 148 S.C. 428, 437 (1926).

It is true that in *Cape Romain* the court says:

> The title to land below high water-mark on tidal navigable streams, *under the well-settled rule,* is in the state, not for the purpose of sale, but to be held in trust for purposes (emphasis added),[24]

but it is equally true that this statement is only a dictum, entirely unnecessary to the decision of the case, and is not supported by any of the authorities cited by the court. The "well-settled" rule had been that it was the land below *low-water* mark in tidal navigable waters that was held in trust by the state, and even that rule is not of invariable application, as will appear from the Charleston Harbor cases.

It is a historical fact, that the greater part of the City of Charleston was at one time wholly or partly under water; that is, a considerable part of the city was at one time below low-water mark and most of the remainder was between the low- and high-water marks. It is also a fact that there are still some lots in Charleston which are privately owned but which are wholly or partly below low-water mark and in the bed of the Cooper or the Ashley River. However, the titles to these lots have been seldom, if ever, disputed and the few cases which mention or refer to these low-water lots do so only tangentially.[25]

In the *West End* case the operative facts were essentially identical to those in the *Ehrhardt* case, and as they are stated much more fully in the *Ehrhardt* case, no digest of the *West End* case is needed.

In the *Haesloop* case the facts were that in 1909 the City Council of Charleston commenced reclamation of a very substantial area, over forty acres in extent. Part of this land was owned by the city and part by private individuals, but almost all of it was below high-water mark and most of it was below low-water mark. More than two hundred lots were formed in the reclaimed area, and the Fort Sumter Hotel stands on one of them. The *Haesloop* case was an action to restrain the city from conveying this lot to the hotel company on the ground, among others, that such conveyance would

24. *Id.* at 438.
25. Ehrhardt v. City Council of Charleston, *supra* note 22; Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927); Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); West End Dev. Co. v. Thomas, 92 S.C. 229, 75 S.E. 450 (1912).

violate Section 31 of Article III of the Constitution of 1895, which prohibits the donation to "private corporations or individuals" of "lands belonging to or under the control of the state." It was held that the state's fee simple title to the lot in question had been granted to the city by the act which incorporated Charleston,[26] and hence that it did not belong to, and was not under the control of, the state. The conveyance was accordingly approved.

It has already been mentioned that various private persons owned lands in the reclaimed area which, prior to the reclamation, were entirely under water. A number of these persons conveyed to the city a right of way for the street now known as Murray Boulevard, but which was then in the Ashley River. Part of the consideration for the conveyances was the city's agreement to pave the street at no expense to the grantors. Many years later the city undertook to levy against these grantors and their successors in title an assessment for paving Murray Boulevard, whereupon an action was brought to enjoin such assessment.[27] The case was tried before Judge Milledge L. Bonham, afterwards chief justice of our supreme court, who granted a permanent injunction. In his decree, adopted by the supreme court as its opinion, he says that the plaintiffs "parted with valuable property rights"[28] in consideration of the city's covenants.[29] These "valuable property rights" consisted of the ownership of lands that were, for the most part, wholly under water.

Ehrhardt v. City Council of Charleston was an action to restrain the city from conveying a tract of 7.4 acres on which the Sergeant Jasper apartment house is now located, but which at the time of the decision was a mud flat, almost all of which was covered by water at high tide and a considerable part of which was covered by water at all times. (The westernmost portion of the tract was still under water as recently as 1958). The ground on which it was sought to restrain the conveyance was that the land in question had been set aside as a common by the Provincial Assembly.[30] In sustaining the validity of the conveyance our supreme court re-

26. 7 Stat. at Large 1783.
27. Cheves v. City Council of Charleston, *id.*
28. *Id.* at 426.
29. Ehrhardt v. City Council of Charleston, *supra* note 22.
30. 7 Stat. at Large 87 (1768).

views a number of acts, from 1783 to 1930, by which the state has granted to the City Council of Charleston extensive areas in the bed of the Ashley River, including much land that is wholly submerged at all times. (Parenthetically, the city has reclaimed and is still in the process of reclaiming, some of this land that was originally always under water. And so far as the writers know the marketability of the city's title to this reclaimed land has not been questioned.)

The *Ehrhardt* decision is dated September 23, 1949. Not quite seven months later, on April 18, 1950, our supreme court decided *Rice Hope Plantation v. South Carolina Pub. Serv. Authority*,[31] wherein the court said:

> The briefs on both sides in the case before us contain much discussion on the subject of ownership of the land lying between normal high water mark and low water mark on tidal navigable streams, and as to the acquisition of title thereto by private owners. We adhere to our opinion in the case of *Cape Romain Land & Improvement Co.* . . ., wherein it was said: 'The title to land below high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes.' But we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners, because any such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters.[32]

In *Rice Hope* the plaintiff owned lands on the Santee River near its mouth. The defendant's Santee-Cooper project, by diverting large quantities of water from the Santee, caused greatly increased salinity in the lower Santee. This salt water occasionally overflowed the plaintiff's lands, killing vegetation and rendering the lands substantially useless for hunting and fishing. The plaintiff claimed damages both above and below high-water mark. The defendant moved to strike portions of the complaint and the plantiff moved to strike parts of the answer and to make the answer more definite and certain. The circuit judge denied the defendant's motion and granted

31. 216 S.C. 500, 59 S.E.2d 132 (1950).
32. *Id.* at 530.

the plaintiff's, but on appeal his order was reversed in all but a few respects. However, despite a long and elaborate opinion, and despite the language hereinabove quoted, there was no holding that the plaintiff had no title below high-water mark in tidal, navigable waters or that it had no title to the beds of streams intersecting its property that are tidal but not navigable. The circuit judge had, in substance, ruled both points in favor of the plaintiff; this ruling was expressly excepted to; the exception was agreed to by both parties—but the point was left undecided, doubtless because it was not directly involved in any of the motions which were under consideration. The authors had the benefits of the transcript of record and briefs in this suit and are therefore better able to say what was involved than is usually the case.

Early v. South Carolina Pub. Serv. Authority,[33] an action of the same nature as *Rice Hope*, resulted in a verdict and judgment for the plaintiff of over $70,000.00 which was affirmed on appeal. In the *Early* case, the court said that the power of the government in the interest of navigation

> . . . extends to the entire bed of the stream, i.e., to ordinary high water mark on either side and that whatever private property rights or interests a riparian owner may have within those boundaries may be taken or destroyed in the exercise of that power without obligation on the part of the government to compensate him therefor, because they always were, and always will be, subject to the navigation servitude.[34]

This language obviously recognizes the existence of private property rights below high-water mark even though it does not undertake to define such rights.

Finally we come to *Beaufort County v. Jasper County*,[35] the most recent decision on marshland as such. Yemassee Township was detached from Beaufort County, and the issue was whether Beaufort County would still contain five hundred square miles as required by the Constitution of 1895. The case was referred by consent to an eminent Columbia lawyer as special referee, who found that five hundred square miles would remain if marshland was included and then continued:

33. 228 S.C. 392, 90 S.E.2d 472 (1955).
34. *Id.* at 406.
35. See note 13 *supra*.

> I am of the opinion, and so hold, that the soil under water between high and low-water mark constitutes land. . . . It therefore follows that marsh land and inland water likewise constitute land, the subject of state and private ownership.[36]

Except as to inland water, the referee's report was adopted by the supreme court as its opinion.

Thus, in this, the most recent case where the point was at issue, the supreme court has said that "marshland (is) the subject of . . . private ownership." When this forthright statement is taken with the quotation from the even more recent *Early* case the authors feel that they can say that the dicta of *Cape Romain* and *Rice Hope* have been recently, if quietly, interred.

IF MARSHLAND MAY BE GRANTED, GRANT MAY EQUALLY BE PRESUMED

But for the dictum of *Cape Romain,* the authors would have thought that the proposition above set forth was not subject to successful question. Not only is the law so laid down by Lord Hale and Mr. Angell, but it is equally clearly set forth in the decisions of our own court in opinions written by judges of the highest reputation. Thus in *Riddlehoover v. Kinard, Adm'r,*[37] Chancellor Harper, then one of the justices of the court of appeals, spoke as follows for a unanimous court:

> I shall first consider the ground of defendant's motion, which respects the lapse of time or the statute of limitations. Defendants, or those under whom they claim, had been in possession of the estate, claiming it as their own, for more than twenty years before the filing of the bill. . . . The lapse of twenty years is sufficient to raise the presumption of a grant from the State, of the satisfaction of a bond, mortgage, or judgment, of the grant of a franchise or the payment of a legacy, or almost any thing else that is necessary to quite title to property.[38]

In *Kolburn v. Hollard,*[39] Chief Justice Dunkin said:

> But the judgment of the Court is based on other and independent consideration. Whatever rights the plaintiff

36. *Id.* at 490.
37. 1 Hill's Eq. 376 (S.C. 1833).
38. *Id.* at 378.
39. 14 Rich. Eq. 176 (S.C. 1868).

had on 7 December 1859, when his bill was preferred, he enjoyed equally in March 1837, when he attained his majority. *Riddlehoover v. Kinard,* . . . decided nearly forty years since, has become one of the landmarks of the law. It is commended to approval, as well from the authority of the distinguished jurist, who was the organ of the court, as from the cases cited, and the wisdom and the policy of the principles announced. . . . 'If (says Chancellor Harper) 'there had been no will, and no administration, and defendants, without color of title, had taken possession of the property, and kept it for so long a time, I suppose their title would be good under the decisions. . . . Administration would have been presumed, and the defendants had acquired a title from the administrator. The lapse of twenty years is sufficient to raise a presumption of a grant from the State, of the satisfaction of a bond, mortgage, or judgment, or the grant of a franchise or the payment of legacy or almost anything else that is necessary to quiet the title to property.' . . . Again, 'It is hardly necessary to say that legal presumptions are not founded on actual belief. . . . Presumptions must be sometimes made against the well known truth of the fact.'[40]

The precise point in issue came up for consideration in *Busby v. Florida & R. R.*[41] This was an action to recover damages to the plaintiff's lands from fires which were caused by sparks from the defendant's locomotives. The defendant denied the plaintiff's title. The plaintiff relied upon adverse possession for fifteen years, but there was no evidence that the land had ever been granted by the state. However, the plaintiff had been paying taxes on the land during the period of his adverse possession. The circuit court denied a motion for a non-suit, which was made on the ground that the plaintiff had failed to show any title in himself, and there was a verdict and a judgment for the plaintiff. Chief Justice McIver stated:

> The precise question, as we understand it, intended to be presented by this appeal, is whether a party whose claim rests upon an assertion of title to real estate can establish such claim by proof of adverse possession for

40. *Id.* at 234.
41. 45 S.C. 312, 23 S.E. 50 (1895).

the statutory period, without first showing that the title to the real estate in question has passed out of the state. In the determination of this question two inquiries are presented: Whether adverse possession of real estate for the statutory period confers a positive, affirmative title, or simply operates as a bar to the claim of anyone seeking to dispossess the person in possession. . . .

* * *

The next inquiry is presented is whether it is necessary, in order to establish a title to real estate acquired by adverse possession, to show that the title to such real estate has passed out of the state; and, if so, whether, in this case, there was any evidence tending to show that fact; for, if so, then there was no error in refusing the motion for a nonsuit, and no error in charging the jury in accordance with the ruling on the motion.[42]

The court held that adverse possession conferred a positive, affirmative title, and then continued as follows:

As was said by Mr. Justice McGowan in the case of *State v. Pinckney*, 'Our doctrine is that the state succeeded at the Revolution to all the rights of the British crown, one of which, as Lord Coke tells us, was that all lands are holden mediately or immediately of the king. The state, with us, is the common source of title, and retains it indefinitely; it may be, until it passes from her in the only manner known to the law, by presumption, either express or implied, or hereafter, possibly, by operation of the new statute of limitations.' Hence, when one undertook to establish a title to real estate by adverse possession, it was necessary to show that title to such real estate had passed out of the state; the maxim, 'Nullum tempis occurit regi,' being recognized here. Now, however, since the possession provisions of the Code have been enacted, *we see no reason why a party who has been in adverse possession of land for the requisite period may not acquire a title against the state.* But, be that as it may, there was no evidence in this case of adverse possession by the plaintiff for a period of twenty years—sufficiently long to bar an action by the state,—as the evidence only shows a possession for fifteen years.

42. *Id.* at 314.

> We must therefore inquire whether there was any other evidence tending to show that the state had parted with title to the land claimed by plaintiff; for, if there was any evidence tending to show that fact, that would under the well-settled rule, not justify, but require, a refusal of the motion for a nonsuit. Now, the fact that the plaintiff had been paying taxes on the land for a number of years, as appears by the amendment made to the case at the hearing by consent, and the further fact that it did not appear that the state was setting up any claim to this land, do afford evidence—whether sufficient or not it was for the jury to determine—that the state had parted with its title to the land, *for certainly we would not be justified in assuming that the state would collect taxes on its own land.* The judgment of this court is that the judgment of the circuit court be affirmed. (Emphasis added.)[43]

Further, this point was considered in *State v. Pacific Guano Co.*[44] and *State v. Pinckney,*[45] in both of which title to marsh lands was expressly in question and it was considered by the court that, since marshlands were grantable, a grant may be presumed to the same extent as for any other grantable lands in the state. The authors invite particular attention to *State v. Pacific Guano Co.* wherein the distinction between the presumption of a grant on the one hand and adverse possession of the other, is set forth carefully and in great detail.

Extensive and indeed exhaustive research has disclosed neither statute nor decision which in any way limits or impinges upon the authority of the decisions above set forth and the authors therefore feel that they can affirmatively assert that a grant to marshland may be presumed, subject to the caveat that a grant which gives tidal waters as its boundaries is presumptively a grant only to high-water mark. Nevertheless, as is elaborately explained by Lord Hale and Mr. Angell, a grant which on its face extends only to high-water mark may be extended by proof of usage under such a grant.

43. *Id.* at 318.
44. See note 6 *supra.*
45. *Ibid.*

ADVERSE POSSESSION

Prior to 1870, there was no statute of limitations against the state but in that year the legislature enacted what is now Section 10-121 of the Code of 1952, which now reads as follows:

> The State will not sue any person for on in respect to any real property or the issues or profits thereof by reason of the right or title of the State to the same unless:
>
> (1) Such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced; or
>
> (2) The State or those from whom it claims shall have received the rents and profits of such real property or of some part thereof within the space of twenty years.[46]

As originally enacted, the statute provided for a forty-year limitation period which was reduced to twenty years in 1873. Surprisingly enough it has never been construed.

In *State v. Pacific Guano Co.* and in *State v. Pinckney*, both decided in 1884, the court cited this statute but pointed out that twenty years had not then elapsed since enactment, so that it was therefore inapplicable in those two cases. This statute was again considered in *Heyward v. Farmers' Mining Co.*[47] in which the court held that where the plaintiff's rights accrued prior to 1870, they were covered by the forty-year statute of limitation enacted in 1870 rather than by the twenty-year statutory period specified in the amendment of 1873, because the amendment was inserted in an act which expressly declared that its provisions should not extend to causes where the right to action had accrued.

The only subsequent decision involving this statute was *Trustees of Univ. of S. C. v. City of Columbia,*[48] where the court held that a municipal corporation, being a mere creature of the legislature, is not entitled to plead adverse possession against the state; however, the court seems to have assumed that a private individual, under the circumstances shown to exist in that case, would have acquired a good title by adverse

46. S.C. Code §10-121 (1952).
47. See note 6 *supra*.
48. 108 S.C. 244, 93 S.E. 934 (1917).

possession against the state. Be that as it may, the statute certainly seems sufficiently unambiguous. And the only real question that can seem open would be whether a claimant of marshlands had exercised such acts of ownership over the marsh as would be sufficient if he were claiming by adverse possession against another private individual.

Our South Carolina statute was apparently lifted bodily from the New York statute which was considered in *People v. Rector of Trinity Church,*[49] wherein the court held, among other matters, that the state must prove affirmatively that the land sued for had been taken within the statutory period. The decision was cited to this point in the circuit decree in *State v. Pinckney,* but the supreme court in *State v. Pinckney* expressly reserved decision as to whether it would follow this construction of the statute. Since, in order to prevail under a plea of adverse possession, a party must prove that his possession has been continuous as well as adverse for the statutory period, this point seems to be of only academic interest in South Carolina.

It is therefore the authors' view that a claimant to marshland, if sued by the state, is entitled to the benefit of Section 10-121, if, and only if, he can prove possession that has been open, notorious, hostile, and continuous in himself or his ancestors for a full period of twenty years, and that the character of his possession must be the same as in an action between private parties.

49. 22 N.Y. 44 (1860).